JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO COA2023PACR00001

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA

THE DIRECTOR OF PUBLIC PROSECUTIONS v
DENNIS MUNDELL

Miss Paula Llewellyn KC, Director of Public Prosecutions for the appellant

Cecil J Mitchell and Paul Gentles for the respondent

4, 5 July 2023 and 15 March 2024

Criminal Law – Sentence – Prosecution's Right of Appeal – Jurisdiction of the appellate court to amend indictment – Jurisdiction of the court when dealing with an appeal by the prosecutor - Mandatory minimum sentence – Interpretation of section 101(8) of the Firearms (Prohibition, Restriction and Regulation) Act, 2022 – Sections 44 and 45 of the Interpretation Act – Sections 20(1)(a), 20(1)(b), 20(2)(d) and 20(4) of the Firearms Act 1967 – Sections 2, 3, 4, 5, 45(1)(a), 101(2), 101(6), 101(8)(a) and 114(1) of the Firearms (Prohibition, Restriction and Regulation) Act, 2022 – Judicature (Appellate Jurisdiction) Act sections 14, 18A(2) and 18A(8)

BROWN JA

Introduction

[1] This appeal, brought by the learned Director of Public Prosecutions ('learned DPP'), challenges the competence of a judge of the Supreme Court ('the learned judge') to impose sentences for firearm offences, other than those prescribed under the newly minted Firearms (Prohibition, Restriction and Regulation) Act, 2022 ('Firearms Act, 2022'). The long title of the new legislation reads:

> "AN ACT to Repeal and replace the Firearms Act, to provide more particularly for the prohibition, restriction, or regulation (as may be appropriate) of firearms and ammunition, and for connected matters."

Section 114(1) explicitly says, "[t]he Firearms Act, 1967 … is repealed" ('the 1967 Act'). The Firearms Act, 2022, came into force on 1 November 2022 by publication in the Jamaica Gazette Supplement dated 31 October 2022.

[2] The objects of the Firearms Act, 2022 are set out in section 3, which reads:

> "3. Whereas the general objective of this Act is to establish a framework which prohibits firearms and ammunition that are illicitly traded, and which regards possession of those prohibited firearms and ammunition as the foundation on which other heinous and violent crimes are committed; and to provide, distinct from that framework, a regime for the regulation of firearms and ammunition that are lawfully acquired and duly registered, the particular objects of this Act are to-
>
> (a) eliminate the illegal possession, manufacture, trafficking, proliferation and use of prohibited weapons, particularly through the provision of appropriate penalties which deter such activities;
>
> (b) provide for, and promote, the effective management and control of the firearm industry through the establishment of a robust licensing regime;
>
> (c) establish standards that are in keeping with internationally recognised norms and best practices for the firearm industry.
>
> (d) regulate the lawful manufacture, trafficking, possession and use of firearms and ammunition, in the interest of personal and public safety; and
>
> (e) align the legal framework in respect of firearms and ammunition with Jamaica's international treaty obligations."

[3] The respondent was indicted and arraigned for unauthorized possession of firearm and ammunition in consecutive counts, on 16 December 2022, in the High Court Division of the Gun Court, before the learned judge. Under section 2 of the Firearms Act, 2022, "the High Court Division of the Gun Court" is included in the definition of "Circuit Court". The charges in the indictment were laid under section 45(2)(a) of the Firearms Act, 2022 (the correct section is 45(1)(a); there is no subsection 2(a) under section 45). The respondent entered pleas of guilty to both counts. On 10 February 2023, the learned judge sentenced him to concurrent terms of four years and three months' imprisonment on each count.

Background

[4] The facts which grounded the respondent's guilty pleas may be shortly stated. On 2 December, 2022, acting on information, members of the Jamaica Constabulary Force went to lot number 297 Jacaranda Housing Scheme and announced their presence. Getting no response from the occupants, the police broke down the door and entered. The respondent and a female were seen inside the home. The respondent identified himself to the police and stated that he resided at that address. The female also identified herself but asserted she was an overnight visitor to those premises. The police searched the home in the presence of both occupants. That search revealed, on the floor underneath a sofa, a black Glock pistol, bearing serial number DFK710, containing a magazine, loaded with 17 unexpended rounds of ammunition, along with another magazine which had three unexpended rounds.

[5] The respondent admitted that he did not have a licence (firearm authorisation) to possess the firearm and ammunition. He disclosed that he had purchased the firearm for $380,000.00 and placed it under the sofa when he became aware of the presence of the police.

The sentencing hearing below

[6] The learned judge was provided with an antecedent history, as well as a social enquiry report, for her use during the sentencing hearing. Learned counsel who made the plea in mitigation, expressed the view that the learned judge's powers of sentencing were not fettered by the coming into force of the Firearms Act, 2022. His submission on the point is worth repeating. At page 19 lines 9-22 of the transcript, he said:

> "We'll make our plea in mitigation on six points, m'Lady, and before we start we will ask that it be noted that although this incident would have taken place after the new legislation, section 45 subsection (2)(a) [sic] of this particular Act does allow the court discretionary powers to invoke sentence that not only befits the crime but also befits the character of the individual before the court. It, therefore, is our submission that it doesn't shackle or bound the court to any mandatory period and that apply [sic] both for the ammunition and the illegal possession of firearm."

[7] Learned counsel went on to urge upon the learned judge the fact of the respondent's guilty pleas being made on the first relevant date, thus entitling him, counsel submitted, to a discount in any contemplated sentence of up to 50%. Counsel pressed for the maximum discount possible. The plea in mitigation also spotlighted the respondent's age, namely 28 years. Two further submissions were predicated on the respondent's age: (a) he was then without previous convictions although he hailed from what was described as the inner city; and (b) he was not beyond recall/redemption. That the respondent remained in custody from the date of arrest (2 December 2022), to the date of the sentencing hearing was also urged. Other factors laid out for the learned judge's consideration were his good social enquiry report and that he had four dependents between the age of 10 years and nine months. In the view of mitigating counsel, the mitigating factors outweighed the aggravating factors. He concluded by imploring the court to make the sentence "a short, sharp, shock not too onerous in the circumstances".

[8] The learned judge was also of the view that the passage of the new legislation did not deprive her of the discretion previously enjoyed under the 1967 Act. The learned judge's views on the new law, were expressed while addressing the respondent, at page 24, lines 8-24 of the transcript, as follows:

> "You have been charged under the new legislation that is [sic] passed recently and the Act does indicate, as your counsel has quite rightly pointed out, that before this circuit court the imprisonment is one of - - or what is available to the Court in terms of sentencing is imprisonment for life. That however is really the statutory maximum and no minimum restriction has been placed on this Court, therefore this Court disregard [sic] under this section, that is section 45, does continue to have discretion with respect to how it sentences you."

The learned judge then proceeded to sentence the respondent, using the methodology established by **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20, as well as the provisions of the Criminal Justice (Administration) Act ('CJAA').

The appeal

[9] The appellant filed two grounds of appeal, namely:

a) The learned Sentencing Judge did not have the power to impose the sentences of four (4) years and three (3) months imprisonment on each count given the provisions of section 45(2), the Sixth Schedule and sections 101(6) and 101(8)(a) of the Firearms (Prohibition, Restriction and Regulation) Act, 2022; and

b) The sentences imposed were manifestly inadequate or unduly lenient.

The appellant's submissions

Ground one

[10] The learned DPP prefaced her arguments with the observation that the Firearms Act, 2022, having been recently promulgated, was the subject of various interpretations. Consequently, there is need for the development of the jurisprudence in this area. After setting out the statutory provisions referred to in ground one, it was submitted that the learned judge erred in imposing the sentences recited above at para. [3], as the legislation stipulates "a maximum sentence of life imprisonment and a minimum sentence of fifteen years' imprisonment". After inviting the court to set aside the sentences, the learned DPP made the extraordinary suggestion that the matter be remitted to the High Court Division of the Gun Court for a re-trial.

[11] In her oral arguments, the learned DPP acknowledged that the indictment was incorrectly drafted under the non-existent section 45 (2)(a). The learned DPP submitted that the indictment should have been drafted pursuant to section 45(1)(a). On the contrary view, the indictment should have been drafted under section 5(1) of the Firearms Act, 2022. It was the learned DPP's position that whether the indictment was drafted under section 5 or 45, either offence would attract a mandatory minimum sentence. According to the learned DPP, what section 45 envisages is, for example, B decides to take A's firearm, for which an authorisation was issued, and uses it. For the firearm charge to come under this section, the firearm would first have to be the subject of the grant of a firearm authorisation under Part V of the Firearms Act, 2022.

[12] The submission continued, if the firearm was licensed, the sentence would fall to be considered under the Sixth Schedule which prescribes imprisonment for life, on conviction before a Circuit Court. That necessarily involves a reference to section 101(8)(a) which suspends the operation of the Parole Act and prescribes a mandatory minimum parole ineligibility period of imprisonment of 15 years, where life imprisonment is the sentence. The learned DPP concluded that if this interpretation is correct, then it would

mean that the learned judge erred in law when she imposed the sentence of four years and three months' imprisonment.

[13] In the submission of the learned DPP, it appears that the intention of Parliament is for a mandatory minimum sentence to be imposed for offences under the Firearms Act, 2022 where the offence is tried in the Circuit Court. **Tafari Morrison v R** [2023] UKPC 14 was cited, in which the Privy Council adjudged a mandatory minimum sentence not to be unconstitutional. Apparently the only exception to this general rule of mandatory minimum sentences is where the offence is tried in the Parish Court; and even there the penalties are severe.

[14] In the submission of the learned DPP, the intention of Parliament in passing the Firearms Act, 2022, is that once someone is in possession of an unauthorised, or prohibited firearm or uses, or attempts to use, a firearm or imitation firearm, with intent to commit a felony, among other offences under section 14(4), there should be a mandatory minimum sentence; life imprisonment in respect of the former and a fixed term of between 20 and 25 years' imprisonment for the latter. Section 14 is not relevant for the purposes of this appeal, but serves to underline the intention of Parliament.

[15] The learned DPP concluded her submissions under this ground with a formal request that the statement of offence in the indictment be amended to read "contrary to section 45 (1) (a)". If the amendment is granted, the sentencing choice would be life imprisonment with a minimum period of 15 years' imprisonment before parole eligibility. This, it was argued, is evident from the plain meaning of the Sixth Schedule, which triggers a reference to the other section, namely section 101(6). Section 101(6) of the Firearms Act, 2022 neutralises the effect of section 44 of the Interpretation Act (presumption that the stated penalty is the maximum).

Ground two

[16] In the skeleton arguments, the learned DPP acknowledged the power of this court to re-sentence the respondent. However, the learned DPP urged us not to go along that

route since the learned judge was bound to impose a mandatory minimum sentence. In the view of the learned DPP, it would not be in the interests of justice to invite this court to re-sentence the respondent in these circumstances. In elaborating, the learned DPP said it was the Crown's understanding that the plea was entered on the basis of a belief that there subsisted in the court below, a discretion to impose a sentence below the prescribed statutory mandatory minimum. Therefore, upon these premises, we were urged to remit the matter to the Supreme Court to facilitate the respondent receiving appropriate legal advice and thereafter determine the way forward.

[17] The learned DPP pressed the point in her oral argument. According to her, the combination of the overriding objective of fairness and, inferentially, the legal advice that informed the plea, moved the Crown to ask for a re-trial, instead of re-sentencing. **Osmond Williams v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 195/1976, judgment delivered on 21 October 1977, was cited in support of this position. In this case, the learned DPP concluded, given the facts, the interests of justice would determine that the law should have its course. In her additional oral submissions, the learned DPP urged us to rely on **Osmond Williams v R** and declare the proceedings below a nullity, which would provide an opportunity for all the issues to be ventilated in the court below.

[18] At the request of the learned DPP, the court allowed the Crown to make further submissions on the question of whether the court below retained a discretion where the defendant pleaded guilty. During an exchange with the court, the learned DPP accepted that the Firearms Act, 2022 creates two discrete regimes under Parts II and IV, which do not overlap. Consequently, under section 5 (Part II) there must have been no authorisation. Hence, the weapon is prohibited. However, under section 45 (Part IV) it presupposes that an authorisation had been granted but the weapon was found in the possession of a person not so authorised.

[19] Where the charge is laid under section 5, the relevant provision of the Criminal Justice (Administration) Act ('CJAA') dealing with discounts, has been excluded, the

learned DPP submitted. This is by virtue of an amendment to section 42C of the CJAA by the Seventh Schedule of the Firearms Act, 2022. In the Crown's submission, Parliament, either deliberately or through oversight, did not similarly exclude section 45 of the Firearms Act, 2022. The implication, therefore, is the subjection of section 45 to the discount regime of the CJAA in relation to the parole ineligibility period, since the sentence is life imprisonment.

Submissions on behalf of the respondent

Ground one

[20] The major premise of the respondent's submissions was that, notwithstanding the passage of the Firearms Act, 2022, the learned judge retained the sentencing discretion and powers granted to her under the CJAA and the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Court, December 2017 ('the Sentencing Guidelines'). To this end, in the written submissions, three principal points were made. Firstly, the learned judge exercised her discretion pursuant to the CJAA. Secondly, the CJAA was not expressly repealed by the Firearms Act, 2022. Thirdly, the sentence imposed by the learned judge, in the face of the plea of guilty, was calculated pursuant to the principles set out in the Sentencing Guidelines. Therefore, relying on **R v Ball** (1951) 35 Cr App Rep 164, it was submitted that the learned judge did not err in sentencing the respondent, warranting intervention by this court.

[21] In an effort to support the argument that the learned judge had the discretion, counsel contrasted sections 5 and 45. Whereas under section 5(2) it clearly lays down that a conviction before a Circuit Court attracts a term of imprisonment, "of not less than fifteen years nor more than twenty-five years", the penalty under section 45(2) is simply "on conviction … imprisonment for life". Counsel for the respondent did not question life imprisonment as the penalty under section 45. However, counsel submitted that "on conviction" applied where the defendant went to trial, not where he entered a plea of guilty. Interestingly, counsel next quoted a definition of 'conviction' from Black's Law Dictionary 6th ed as follows: "to find a person guilty of a criminal charge, either upon a

criminal trial, a plea of guilty, or a plea of nolo contendere"; (This definition is repeated, *ipsissima verba*, in the 9th ed of that text, under "convict").

[22] Counsel then argued, by reference to **Joel Deer v R** [2014] JMCA Crim 33, and highlighting several cases discussed in that judgment, that the court's approach to sentencing in respect of persons who were tried and found guilty and those who pleaded guilty has been quite different, over many decades. That exposition was further underlined by what was described as the codification of the common law practice by amendments to the CJAA. In particular, counsel emphasised "Part 1A. Reduction of Sentence upon Guilty Plea" and underlined section 42D (reduction in sentence of up to 50%, if the plea was entered on the first relevant date; 35% before the commencement of trial; or 15% after the trial began). Reliance was placed on section 42D(3) which authorises a sentencing judge, subject to provisions of section 42E that deals with murder which does not attract the death penalty, to impose a sentence without regard to the prescribed statutory minimum sentence where the defendant pleaded guilty.

[23] The references to provisions of the CJAA were reinforced by citations of portions of the Sentencing Guidelines which, essentially, speak to the authority to impose a sentence below the prescribed statutory minimum. Counsel contended that section 42D of the CJAA had not been expressly repealed by the Firearms Act, 2022. The further contention was that it was upon the authority of section 42D that the learned judge exercised her discretion and reduced the sentence of the respondent, on account of the respondent's early guilty plea. This submission was capped by the argument that, in applying the discounts, the learned judge acted pursuant to the principles set out in the Sentencing Guidelines.

Ground two

[24] In response to the learned DPP's proposal to remit the case to the Supreme Court, the respondent submitted that that would not only be oppressive and an abuse of process but also a trial on the same facts, inviting a plea of *autrefois convict*. Citing **Lloydell Richards v R** (1992) 41 WIR 263, it was submitted that the respondent pleaded guilty

before a court of competent jurisdiction, was sentenced and is already serving his sentence. Therefore, unlike in **Lloydell Richards v R** in which the defendant had not been sentenced, the plea of *autrefois convict* would be available to the respondent. **Bhola Nandlal v The State** (1995) 49 WIR 412, **Wemyss v Hopkins** (1875) LR 10 QB 378 and **Connelly v Director of Public Prosecutions** [1964] AC 1254 were also referenced in support of these submissions.

[25] Replying to the Crown's reliance on **Osmond Williams v R**, Mr Gentles submitted that that case concerned the conviction, while in the instant case the appeal is only against sentence. Unsurprisingly, learned counsel took the opposite view to that of the learned DPP in asking us not to treat the proceedings below as a nullity. Accordingly, in the absence of an appeal against conviction, the respondent's prayer is that the case not be sent back for a re-trial. Learned counsel accepted that section 45 of the Firearms Act, 2022 is not excluded from the operation of the CJAA and reiterated that the learned judge did nothing wrong, as it relates to section 45.

Discussion

[26] The overarching issue in this appeal is raised in ground one, namely, was the learned judge competent to impose the impugned sentences? If the answer to that question is in the negative, then the adequacy of the sentences, raised in the second ground, becomes moot.

[27] The discussion may be more readily appreciated if the law as it stood under the 1967 Act forms its silhouette. Part IV of the 1967 Act, dealt with the possession and use of firearms and ammunition. By virtue of section 20(1), it was both an offence to be in possession of a prohibited weapon without a licence and any other firearm or ammunition except under a Firearm User's Licence. For ease of reference, section 20 (1) is extracted below:

> "20. – (1) A person shall not-

(a) save as authorized by a licence which continues in force by virtue of any enactment, be in possession of a prohibited weapon; or

(b) subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence."

Section 2 of the 1967 Act defined "prohibited weapon" to mean "any artillery or automatic firearm; or any grenade, bomb, or other like missile". A "firearm" was defined as any lethal barrelled weapon capable of discharging any shot, bullet, or other missile. A "firearm" included, amongst other things, any restricted or prohibited weapon and component parts of such weapons, together with notable accessories. A restricted weapon meant "any weapon, of whatever description or design which is adapted for the discharge of any noxious liquid, gas or other thing".

[28] There was, therefore, an absolute prohibition against the possession of a prohibited weapon, save under licence, under section 20 (1)(a) of the 1967 Act. Further, a licence was required to possess firearms and ammunition that fell outside the definition of prohibited weapon (see section 20 (1)(b)). Subsection 20 (1)(b), by virtue of it being subject to subsection 2, excepted a number of persons from the requirement of a licence in specifically defined circumstances, for example, an executor or administrator of a deceased person's estate, during the period of 30 days after which he came into possession of the firearm or ammunition (see section 20 (2)(d) of the 1967 Act). None of those exceptions concerns us in this appeal.

[29] The exceptions aside, contraventions of section 20 exposed the defendant to imprisonment for life, if convicted before a Circuit Court. Section 20(4), in so far as is relevant, reads:

"(4) Every person who contravenes this section shall be guilty of an offence, and shall be liable –

(a) if the offence relates to the possession of a prohibited weapon –

(i) …

(ii) on conviction before a Circuit Court to imprisonment for life with or without hard labour;

(b) if such person is a restricted person or if the offence relates to the possession of a restricted weapon or restricted ammunition –

(i) …

(ii) on conviction before a Circuit Court to imprisonment for life with or without hard labour; and

(c) in any other case –

(i) …

(ii) on conviction before a Circuit Court to imprisonment for life with or without hard labour."

It is plain that the 1967 Act did not make the sentence of imprisonment for life mandatory or require the imposition of a minimum term of imprisonment. The literal meaning of the word, "liable", used in this context, is "subject to or likely to incur (a fine, penalty, etc.)" (see Black's Law Dictionary 8th ed). Therefore, under the 1967 Act, the convicted person was merely subject to incur the penalty of life imprisonment.

[30] This provision of the 1967 Act was also governed by sections 44 and 45 of the Interpretation Act. Firstly, where a person may be sentenced to a term of imprisonment, the implication is that that refers to the maximum term. Secondly, where, as under the 1967 Act, the term of imprisonment appears at the foot of the section creating the offence, in the absence of a contrary intention, the offence is punishable by a period of imprisonment, delimited by the term stated. Having regard to the pivotal role these sections will play in the interpretation of the Firearms Act, 2022, they are set out in full below:

"44. Where any fine or penalty is imposed by or under the authority of any Act it shall be implied that the amount of such fine or penalty is the maximum amount; and where by any

> Act any person may be sentenced to any term of imprisonment it shall be implied that such term of imprisonment is the maximum term.
>
> 45. Where in any Act any fine, penalty or term of imprisonment is set out at the foot of any section it shall indicate that any contravention of the section, whether by act or omission, shall be an offence against that Act and shall, unless the contrary intention appears, be punishable by a fine, penalty or term of imprisonment not exceeding the amount or term stated."

[31] The settled position was, therefore, that the sentence of imprisonment for life enacted in section 20(4) of the 1967 Act, was only a maximum sentence. This was confirmed and declared by this court in, for example, **Leon Barrett v R** [2015] JMCA Crim 29. In that case, the judge at first instance erroneously thought that a 2010 amendment of the 1967 Act had ushered in a prescribed minimum sentence of 15 years' imprisonment. F Williams JA, after highlighting the sections amended, said, at para. [84]:

> "It is therefore apparent that section 20 (1)(b), under which the applicant was charged, is to be read as it was before the amending Act took effect (and in actuality, as it still now reads) ..."

F Williams JA went on to quote a part of section 20(4) (set out above at para. [29]), then said, at para. [85]:

> "It will be seen, therefore, that the maximum punishment for illegal possession of firearm, when charged under section 20 (1)(b) is life imprisonment (it so remains under the amended Act); but that no statutory minimum sentence exists under this section."

What F Williams JA said about the maximum sentence for illegal possession of firearm, was applicable, with equal force, to the charge of illegal possession of ammunition.

[32] It was within the confines of the law as it stood, that sentencing judges in the courts below exercised a discretion in both the type and length of sentence, if imprisonment was the option, that should be imposed upon conviction for illegal

possession of firearm and ammunition. Hence, it was legitimate for the sentencing judge to have regard to the methodology laid down in cases such as **Evrald Dunkley v R** (unreported), Court of Appeal, Jamaica, Resident Magistrate Criminal Appeal No 55/2001 judgment delivered on July 5 2002, **Meisha Clement v R** and **Daniel Roulston v R**, to name the seminal few in this area.

[33] The learned judge's conclusion that the court retained a discretion in sentence, in the face of the new Firearms Act, 2022, was based on three premises (a) the sentence available to the court was life imprisonment, (b) that sentence was only the maximum penalty, and (c) no minimum restriction was placed on the court. The learned DPP contends that this argument is unsound as the minor premise, that is, the absence of a minimum restriction, is false; hence the conclusion that the court retained a discretion must also be false. Counsel for the respondent does not concede the point. According to the learned judge and the respondent's counsel (who also appeared below), the repeal of the 1967 Act and the enactment of the Firearms Act, 2022 did not inaugurate a situation of the old things passing away and all things being made new. And so we come to the provisions of the Firearms Act, 2022.

[34] The legislature has introduced a bifurcated replacement of section 20 (1)(b) of the 1967 Act. One prong of this subdivision, Part II, encompasses an absolute ban on the possession of, stockpiling, trafficking in or possession with the intent to traffic, manufacture of, or dealing in, any prohibited weapon, among other offences. The other prong of this two-pronged approach (Part IV) concerns restrictions on the import and export of firearms ammunition into and out of the island, and their possession and use intra island. This nigh perfect siloed approach is evident from the provisions of section 4 of the Firearms Act, 2022. Save, as specifically set out in the Firearms Act, 2022, the enactments under Part II do not apply to firearms and ammunition regulated under Part IV and, particularly, the provisions of Part IV shall not apply to prohibited weapons (see section 4 of the Firearms Act, 2022).

[35] An example of a possible intertwine of Part II and Part IV, is section 14 of the Firearms Act, 2022. By the provisions of section 14(3), it a felony to have a firearm or ammunition in one's possession either at the time of, or when being apprehended for, a First Schedule offence. The offences contemplated fall under several statutes, for example the Dangerous Drugs Act. Possession of a firearm or ammunition in these circumstances makes no distinction as to whether the firearm was either a prohibited weapon or unauthorised; or the ammunition unauthorised. This is clear from the wording of section 14(7), which is in the following terms, "[t]his section applies to prohibited weapons, and to firearms and ammunition regulated under Part IV". Section 15(3) of the Firearms Act, 2022 is identical in its wording and effect to section 14(3) in relation to the felonies created under section 15.

[36] Therefore, save for those limited circumstances which are clear legislative exceptions, the Firearms Act, 2022 has ushered in two distinct and separate classes of offences regarding unlawful possession of firearms; one for prohibited weapons (which appears to be absolute) and the other in respect of firearms and ammunition for which the State, through its regulatory body, had granted an authorisation to possess, but not to the person found in possession (unauthorised possession). Consequently, when someone is found in possession of a firearm, the investigation to prove the person was operating outside the law does not end with a negative answer to the question, "do you have an authorisation?". Invariably, it appears, inquiries must also be made of the Registrar of the Institute of Forensic Science and Legal Medicine, who is the keeper of the National Firearms Register ('NFR'), concerning the provenance of the firearm. If the firearm appears in the NFR, then the charge should be under section 45(1)(a) of the Firearms Act, 2022. On the other hand, if the firearm was never registered, it would be a prohibited weapon, warranting charge under section 5(1) of the Firearms Act, 2022. We will look closer at the difference between the two sections when we turn to consider how to dispose of this appeal.

[37] So, leaving aside section 5 for the moment, we now consider section 45 of the Firearms Act, 2022. Section 45, so far as is relevant, is reproduced below:

> "45.- (1) No person shall be in possession of –
>
> (a) any firearm or ammunition, without the appropriate firearm authorisation granted under Part V; or
>
> (b) …
>
> (2) A person who contravenes subsection (1) commits an offence.
>
> (3) …"

It is noteworthy that section 45, which creates the offences of unauthorised possession of firearm and ammunition, does not stipulate the penalty for doing so. The modern drafting technique employed is simply to state that the person who contravenes the subsection "commits" an offence, as opposed to, "shall be guilty of an offence and shall be liable" before setting out the penalty, as was the approach utilised in the 1967 Act.

[38] Section 45(1)(a) falls under Part IV of the Firearms Act, 2022 which bears the subheading, "Restrictions in Respect of Firearms and Ammunition". All the offences created under this part are simply stated, without the prescription of a penalty in the section creating the offence. The draftsman alternates between "commits an offence", as in section 45(2) or "commits a felony" under section 38 (manufacturing, or possessing a device with intent to manufacture, any firearms or ammunition without a Firearm Manufacturer's Licence). Indeed, section 45 is but an iteration of the drafting style deployed throughout the Firearms Act, 2022. Therefore, in order to discover the criminal liability of a person who contravenes section 45(1), this section must be read in conjunction with Part IX, "Provisions in respect of Offences".

[39] Part IX addresses a range of matters pertinent to penalties. Particularly, and relevant to this appeal, it (i) directs the reader to where the penalties are stated for those offences previously enacted (see section 101(2)), (ii) disapplies section 44 of the

Interpretation Act where the sentence prescribed is life imprisonment (see section 101 (6)) and (iii) suspends the provisions of the Parole Act to facilitate the imposition of minimum periods of parole where the sentence is either life imprisonment or a prescribed minimum term (see section 101(8)).

[40] The relevant aspect of the Sixth Schedule adverts to section 45(2) and, in the penalty column, states, "[o]n conviction before a Circuit Court, imprisonment for life". If the discussion were to be abbreviated at this point, then the learned judge would, arguably, have been correct that the prescribed penalty is only a maximum without a stated minimum. Upon that understanding, the Firearms Act, 2022 left the discretion she previously enjoyed under the 1967 Act untouched. However, that thinking misses the mark in light of subsections 101(6) and (8).

[41] Firstly, as was said earlier (at para. [30]), the implication that the term of life imprisonment is the maximum term, under section 44 of the Interpretation Act, does not apply to the penalty under the Sixth Schedule, by virtue of section 101(6). The practical consequence of section 101(6) is that the term of life imprisonment, is the sentence, without the implication of being a maximum term of imprisonment, together with the corollary that some lesser term may be imposed.

[42] Secondly, and following on from the sentence prescribed under the Sixth Schedule, the Firearms Act, 2022 prescribes a minimum period of 15 years' incarceration before parole eligibility. The relevant part of section 101(8) (a) is reproduced below:

> "Unless otherwise specifically provided in this Act, where the penalty provided for an offence against this Act –
>
> (a) is imprisonment for life, notwithstanding anything in the Parole Act, the court shall specify a term of not less than fifteen years that the offender shall serve before being eligible for parole ..."

The learned judge was, therefore, incorrect in holding that the Firearms Act, 2022 did not prescribe a minimum penalty in relation to the charges to which the respondent had

pleaded guilty. She was also wrong in saying that life was the maximum penalty, since life is the only penalty.

[43] To put the matter squarely, a person convicted before a Circuit Court, which includes the High Court Division of the Gun Court (see para. [3] above), for being in unauthorised possession of a firearm and ammunition (formerly possession without a firearms user's licence), is to be sentenced to imprisonment for life. While there is no adjectival modifier before the statement of the punishment in the Sixth Schedule, we are of the opinion that the sentence is mandatory. When the Sixth Schedule is read together with section 101(8), the sentence for being in unauthorised possession of firearm and ammunition is life imprisonment with the stipulation that the convicted person serves a minimum term of 15 years' imprisonment before becoming eligible for parole.

[44] The learned judge, therefore fell into error when she imposed the sentences of four years and four months' imprisonment, on each count. Those were sentences which the learned judge was not competent to impose as she lacked the discretion previously enjoyed under the 1967 Act, for the reasons discussed above.

Should another sentence be substituted or the case remitted to the Supreme Court?

[45] Prior to the amendment of the Judicature (Appellate Jurisdiction) Act ('JAJA') in 2021 the prosecution did not have the right to appeal. This court's power or jurisdiction to deal with appeals brought by the prosecution is governed by those provisions, in the first place; this court may also resort to powers to control its processes, emanating from its inherent jurisdiction (see **Paul Chen-Young and Ors v Eagle Merchant Bank Jamaica Limited and Anr** [2018] JMCA App 7). In the light of this amendment to JAJA granting the prosecution the right of appeal there are now two discrete provisions for criminal appeals, that is, one by convicted persons and the other by the prosecution. The specific provisions dealing with the jurisdiction for criminal appeals are sections 14 and 18A of JAJA.

[46] We will first consider section 14, the provision dealing with an appeal by a convict and the power to order a retrial. In an appeal against sentence, brought by a convicted person, this court has the option of quashing the sentence and substituting another of greater or lesser severity, if it thinks a different sentence should have been imposed. It is instructive to quote section 14(3) of the JAJA:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal..."

This subsection, on a plain interpretation, permits, in addition to quashing and substitution of the sentence, the dismissal of the appeal.

[47] It is as much a truism as it is trite to say that this court's determination on the question of sentence presupposes a sustainable conviction. That is to say, the constituent elements of the offence in the indictment must be identifiable from, and harmonised with, the supporting facts; and the conviction unimpeachable. So that, on a multiple count indictment where the appellant was properly convicted only on some of the counts, the sentences on these counts are either affirmed or substituted by others warranted by the verdict (see section 24(1) of JAJA).

[48] In a similar vein, where an appellant was convicted and sentenced for one offence and the conviction for that offence is not sustainable, instead of allowing the appeal, the court has another option, depending on the circumstances. If, on the evidence that was before the jury, the court forms the view that the jury must have been satisfied by facts which proved the appellant guilty of another offence, for which he could have been convicted on that indictment, the court makes two substitutions. In the first place the jury's verdict is substituted with a verdict for the other offence disclosed by the facts. The second substitution replaces the sentence imposed at the trial with another sentence, of equal or lesser severity (see section 24 (2) of JAJA). A common example of this provision

in operation is where the jury returned a verdict of guilty to murder but, on appeal, the facts upon which the jury was satisfied proved the act which resulted in the killing but not the requisite corresponding mental element (an iteration of this is **Alexander von Starck v The Queen** [2000] 1 WLR 1270; 56 WIR 424). In those cases, the court would substitute a conviction for manslaughter.

[49] It appears that section 24 (2) contemplates a situation where there has been a trial, and not a case where the appellant pleaded guilty to the offence on an indictment which admits of a lesser offence. In cases where the appellant had entered a plea of guilty to the stated offence and, on appeal, it is discovered that the guilty plea is only maintainable for the lesser offence which flows therefrom, the solution seems to be to quash the conviction and remit the case to the trial court for the appellant's re-arraignment. This approach was adopted in **Austin Richards and Oniek Williams v R** [2023] JMCA Crim 42 ('**Richards and Williams**'), which will be fully considered below.

[50] Aside from this rare decision to remit a criminal case for re-arraignment, the provisions of the JAJA demonstrate a legislative policy of appellate finality in the hearing of criminal appeals, where the verdict is properly grounded in law, in so far as an intermediate appellate court can wield such power. Emblematic of this policy is the proviso to section 14(1) of JAJA (dismissal of an appeal where no substantial miscarriage of justice occurred). In other words, it appears to us that remitting a criminal case to the trial court is an act of last resort, in the context of a guilty plea.

[51] Consistent with the policy of disposing of cases finally, and not remitting them, we examined the circumstances of this case in light of these general provisions of JAJA. Section 24(1) of JAJA clearly does not apply as there was no contention that the respondent was properly convicted on part of the indictment, but improperly convicted on another part. Section 24(2) of JAJA is also demonstrably inapplicable. The charges in the indictment upon which the respondent was arraigned do not admit of lesser offences, as contemplated by the section and instantiated by **Alexander von Starck v The Queen**. This case clearly does not fall under the rubric of these general provisions of

JAJA. We are, therefore, constrained to further explore the possibility of remitting the case to the court below.

[52] In the ordinary appeal, the power of this court to remit a case for a retrial arises in circumstances where the conviction is successfully challenged and the interests of justice require that the case be retried. The relevant parts of sections 14(1) and (2) are set out below:

> "14. – (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any other ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided …
>
> (2) Subject to the provisions of this Act the Court shall, **if they allow an appeal against conviction, quash the conviction**, and direct a judgment and verdict of acquittal to be entered, or, **if the interests of justice so require, order a new trial at such time and place as the Court may think fit**." (Emphasis added)

It is clear, therefore, that in an appeal in the ordinary case, JAJA only empowers this court to order a retrial where it has heard and allowed an appeal against conviction.

[53] The learned DPP has not been empowered to file an appeal against conviction. The amendment of JAJA, which gave the learned DPP the right of appeal, curtailed that right (a) to some circumstances resulting in a termination of the case without a verdict of conviction; and (b) against sentence. In an effort to elucidate the point, we are constrained to set out the 18A(2) of JAJA in full. It reads:

> "Subject to subsections (4) and (5), in any case tried on indictment in the Supreme Court, the prosecutor [learned DPP] may appeal to the Court of Appeal against-

(a) a decision of a Judge of the Supreme Court-

(i) on any point of law; or

(ii) on the ground that there has been an administration of justice offence,

where the decision results in an acquittal, the quashing or staying of an indictment, the withdrawal of a case from a jury, the upholding of a no-case submission, or any other termination of the case without a verdict of conviction; or

(b) sentence imposed by the Supreme Court on conviction, if the appeal is on the grounds that-

(i) the Supreme Court did not have the power to impose the sentence; or

(ii) the sentence imposed is manifestly inadequate or unduly lenient (unless the sentence is the maximum sentence permitted under the applicable laws)."

[54] The relevance of the circumscription of the learned DPP's right to appeal is of paramount importance, in the context of this appeal. That is, as we demonstrated in the case of an ordinary appeal, there is a direct relationship between the grounds of appeal and its final disposition. Section 18A(8) sets out the manner of disposal of an appeal brought by the learned DPP, whether against sentence or termination without verdict of conviction in any of the circumstances listed in section 18A(2)(a)(i) and (ii). In the case of an appeal against sentence, such as the present, this court generally has two options (analogous to section 14(3) of JAJA discussed at para [42]): (i) quash the sentence of the court below and substitute an appropriate sentence or (ii) affirm the lower court's sentence and dismiss the appeal. For clarity, we set out section 18A (8)(a):

"(8) Upon hearing an appeal under this section, the Court may-

(a) in the case of an appeal against sentence-

(i) quash the sentence imposed by the trial court and substitute such sentence as the Court considers appropriate; or

(ii) affirm the sentence of the trial court and dismiss the appeal."

The relevant, and noticeable, difference between section 18A (8)(a)(i) and section 14 (3) is the absence, from the former, of the parenthesized phrase, "whether more or less severe" which appears in the latter. Otherwise, in essence, the power of the court is indistinguishable under both provisions. Conspicuous by its absence is a power of remittal (re-trial) to the trial court.

[55] The power to order a re-trial, on an appeal by the learned DPP, is expressly reserved for cases where this court quashes the decision to acquit and, in its consideration, does not think it appropriate to substitute another decision. Section 18A(8)(b) reads:

> "Upon hearing an appeal under this section, the Court may –
>
> (a) …
>
> (b) in the case of any decision referred to in subsection (2)(a)-
>
> (i) quash the decision and substitute such other decision as the Court considers appropriate; or
>
> (ii) affirm the decision and dismiss the appeal,
>
> but where a decision to acquit is quashed, the Court shall not substitute a guilty verdict but shall order a re-trial of the case."

It is palpable that this appeal by the learned DPP is not against a decision which resulted in an acquittal in the trial court. Therefore, the gateway to order a re-trial (or remit, as it was put during oral arguments) that is, to quash the decision to acquit, is closed.

[56] It is against that background that the learned DPP's reliance on **Osmond Williams v R** to declare the arraignment and subsequent sentencing of the respondent a nullity, and accordingly remit the case to the Supreme Court, must be examined. Osmond Williams was a serving member of the Jamaica Constabulary Force who was authorised to carry a service pistol. The allegation was that he used that service pistol to

commit a homicide. All the proceedings (preliminary inquiry and trial with a jury) leading to his conviction took place before the Gun Court.

[57] Two questions arose for resolution on the appeal against his conviction: (a) did the divisions of the Gun Court have jurisdiction to conduct the respective proceedings held before them? and (b) if not, rendering the proceedings a nullity, did the court have the power to order a retrial? The first question was answered in the negative. That is, although the Gun Court was competent to determine any offence in which the offender's possession was contrary to section 20 of the 1967 Act, Osmond Williams was among the category of persons expressly excluded from the operation of the 1967 Act. Osmond Williams was an exempted person as he was a "constable in respect of any firearm or ammunition in his possession in his capacity as such constable". Accordingly, both the preliminary inquiry and the trial with a jury were a nullity.

[58] Turning to the question of ordering a retrial in the face of a nullity, the court relied on sections 14(1) and (2) of JAJA. It was held that the power to order a new trial is commensurate with the interests of justice. Since the applicant had, in effect, had no trial, the interests of justice warranted that a new trial be held.

[59] The first distinction between **Osmond Williams v R** and the instant case is, as counsel for the respondent submitted, that was an appeal against conviction; the present appeal is patently not against conviction. When it was suggested to the learned DPP that the manner of disposal that she argued for may be considered an appeal against conviction through the backdoor, her response was that the appellate powers granted to her office encompass an error of law (point of law). However, as we have demonstrated, the error of law must have precipitated a decision resulting in a termination of the case without a verdict of conviction. By his plea of guilty, the respondent stood convicted before the learned judge.

[60] Notwithstanding that distinction, can the proceedings yet be declared a nullity? The basis upon which the proceedings in **Osmond Williams v R** were adjudged to be

null and void, does not exist in this case. In that case, the Gun Court lacked subject-matter jurisdiction (the applicant was legally exempted from the jurisdiction of the Gun Court). In this case, the learned judge was unquestionably competent to hear and determine the charges of unauthorised possession of firearm and ammunition (see section 45(1)(a) of the Firearms Act, 2022). There being no want of jurisdiction to adjudicate the indictment, without more, this is not a ground upon which proceedings below could be said to have been a nullity.

[61] That said, can the basis upon which the plea of guilty was entered warrant an interference with the conviction, and provide a foundation to remit the case to the Supreme Court? The foundation of the guilty pleas which the learned DPP sought to impugn was the legal advice supposedly received by the applicant which, the learned DPP said, in short, was erroneous. There was no affidavit evidence in support of this allegation which masqueraded as a submission. However, counsel for the respondent, who also appeared below, did not dispute the veracity of the factual foundation of the learned DPP's submission. The respondent's counsel's position is understandable, given that both in the court below, and before us, he articulated for the retention of the learned judge's discretion to impose sentences in disregard of the new law. It seems fair to assume that the respondent entered his plea of guilty upon the basis of the legal advice received, an interpretation of the law which we hold was a misinterpretation of the Firearms Act, 2022.

[62] To be clear, as we understood the learned DPP, the issue with the legal advice pertains only to the type of sentence to which the respondent was exposed. Based on the facts outlined before the learned judge, the evidence against the respondent was overwhelming, therefore criminal liability under either section 5 or section 45(1) was inevitable. Putting to one side our interpretation of the Firearms Act, 2022 his guilty pleas were understandable in the circumstances. So, the oblique question being raised is, was the advice, assumed to have been given to the respondent, such that it could be said that no reasonable attorney-at-law would have counselled the respondent to adopt the course of entering pleas of guilty, having regard to his exposure?

[63] In **Tyrone Da Costa Cadogan v The Queen** [2006] CCJ 4 (AJ), the standard by which counsel is to be judged was said to be what a reasonable counsel would do. So that, the complaint must demonstrate that no reasonable counsel would have adopted the course taken by counsel. This standard was accepted and applied by this court in **Omar Anderson v R** [2023] JMCA Crim 11, in which the competence of the advocate at first instance was questioned. In **Brenton Tulloch v R** [2019] JMCA Crim 45, at para. [21], Phillips JA said:

> "A majority in the Caribbean Court of Justice case of in **Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ), at paragraph [11], has stated that if counsel's ineptitude has affected the outcome of the trial and where counsel's management of the case results in the denial of due process, the conviction will be quashed regardless of the guilt or the innocence of the accused."

There must, therefore, be a causative relationship between counsel's incompetence and the outcome of the trial, namely a denial of due process. It is arguable that a purported trial in which there was a denial of due process, amounts to no trial at all and therefore is a nullity. Hence, the quashing of the conviction, irrespective of the guilt or innocence of the defendant.

[64] While the learned DPP urged the consequence of a nullity together with the corollary of remittal to the Gun Court, the attack on the advice given to the respondent was not pitched at the height of incompetence of counsel. There was in fact no ground of appeal to that effect. However, even without the characterisation of incompetence, the conduct complained of must fail to meet the reasonable counsel standard, with the resultant causative effect, to warrant the condemnation of nullity.

[65] In this case, the learned DPP is asking us to say the assumed advice that the learned judge retained discretionary sentencing powers, thereby shielding the respondent from a mandatory penalty of imprisonment for life, with a minimum pre-parole period of 15 years, did not meet the reasonable counsel standard and resulted in a denial of due process. It bears repeating that the learned judge entertained a like interpretation of the

Firearms Act, 2022. That, in our opinion, is evidence that reasonable minds could, and did, harbour the same interpretation, even if erroneous, as we hold. We cannot, therefore, say that the legal advice upon which the respondent's guilty pleas were likely made, fell below the reasonable counsel standard.

[66] Equally, there is nothing in the transcript revealing any procedural impropriety or a miscarriage of justice, in how the case was conducted in the Gun Court. The learned judge was seized of the subject-matter and no law exempted the respondent from the jurisdiction of the forum, as in **Osmond Williams v R**. The case cannot, therefore, be declared a nullity and remitted to the Gun Court for re-arraignment, on the basis that the assumed legal advice the respondent received, in terms of his penalty exposure, was wrong.

[67] That said, the concession of the learned DPP, that the respondent ought to have been indicted under section 5(1) of the Firearms Act, 2022, bears within it the kernel of the principle upon which this indictment may properly be remitted to the Supreme Court for re-arraignment. By virtue of that section, the legislature absolutely proscribes the possession of a prohibited weapon. Under section 2 of the Firearms Act, 2022, a "prohibited weapon" means, among other things, "any prohibited firearm". Included in the closed list of meaning of "prohibited firearm" is "any firearm in respect of which no firearm authorisation is granted under Part V".

[68] Part V of the Firearms Act, 2022 (sections 56-85) is subtitled, "Firearm Authorisation". Part V encompasses a range of matters such as compliance with Jamaica's international treaty obligations in the grant of an authorisation (section 56); the types of authorisations, and the procedure by which they may be applied for (section 57); restrictions on the demography, class and character of persons to whom an authorisation may be granted (section 58). More pertinent to this appeal, under Part V the holder of a Firearm (User's) Licence must submit the relevant firearm to the Firearm Licensing Authority for registration (see section 73(1)).

[69] The facts outlined before the learned judge showed that the respondent had no authorisation to possess the firearm and ammunition admitted to have been in his possession. When he was asked, under caution, whether he had a licence (authorisation) for the firearm or ammunition, his reply was in the negative. Therefore, the respondent, by his own admission, was probably, without more, in possession of a prohibited weapon. However, in light of the discussion at paras. [34]-[36] above, the prosecution needed to have something more to definitively delineate the parameters of the appropriate offence to be laid in the indictment. The upshot is, the facts outlined before the learned judge did not point inexorably in the direction of either section 5 or section 45(1). This begs the question; how should the learned judge have proceeded in light of the facts outlined to support the charges upon which the respondent had been arraigned?

[70] Where a defendant has tendered an unequivocal plea of guilty to a charge laid in an indictment, and there is material before the court which suggests the defendant may not be guilty of the offence(s) laid in the indictment but of some other offence(s), before sentencing the defendant, it is the duty of the learned judge to make relevant enquiries, in the interests of justice. If those enquiries confirm the appropriateness of the charge(s) in the indictment, the court may proceed to sentence the defendant. However, if the result of the inquiry leads to the conclusion that the defendant's purported unequivocal plea of guilty was tendered on the basis of an insufficient understanding of the ingredients of the offence or on some other basis, incongruent with the indictment, the defendant must be allowed to withdraw his plea of guilty. He is then re-arraigned according as the facts will sustain.

[71] Those are the principles extracted from this court's decision in **Richards and Williams**. In that case both Richards and Williams were indicted for murder arising out of the shooting death of a taxi driver, pursuant to a plan to rob the taxi driver. Both pleaded guilty as charged. Both gave statements under caution. Amongst the things Mr Williams said was that the plan was to rob the taxi driver. It was he who gave Mr Richards the firearm. While travelling in the taxi, Mr Richards shot the taxi driver in the head after

which the car crashed. He said they then panicked and ran. Mr Richards, in his cautioned statement, said, so far as is relevant, that the firearm accidentally discharged and he did not mean to kill the taxi driver.

[72] Mr Williams' appeal was contested on the basis that the trial judge erred in accepting his plea of guilty to murder as that offence was, in law, insupportable, on the facts disclosed. This court formed the view, upon an examination of the transcript, social enquiry report and other material before it, that the trial judge should have been alerted to the possibility that Mr Williams lacked the mental element for the offence of murder. It was against that background that Dunbar-Green JA said, at para. [74] that:

> "the learned judge was required to make the necessary enquiries, not only in light of Mr Williams' explanations; but on the basis of the facts put before him by the prosecution."

The trial judge having failed to attempt any distillation of the facts, this court quashed the conviction, set aside the sentence and remitted the case to the Supreme Court for the appellant's re-arraignment.

[73] In the instant case the learned judge did not make any enquiries of the prosecution concerning the sufficiency of the facts to accord with the offences to which the respondent had pleaded guilty, perhaps on account of the fact that the Firearms Act, 2022 was freshly promulgated. Although the Firearms Act, 2022 had only recently come into force, the learned judge ought to have been put on alert to make specific enquiries of the prosecution concerning the adequacy of the evidence to support the indictment, in light of the discrete offences created by sections 5 and 45 of the Firearms Act, 2022; and at least one collateral, but important consideration. We will return to this consideration below, at para. [76].

[74] As we observed above, one of the particular objects of the Firearms Act, 2022, is to "eliminate the illegal possession … proliferation and use of prohibited weapons" (see para. [2]). So that, departing from what obtained under the 1967 Act, a firearm for which authorisation could otherwise have been obtained under Part V, but has not been so

obtained, is defined as a prohibited firearm. Under the 1967 Act, the ghost of which haunted the court below, the possession of a firearm without being the holder of a Firearm User's Licence did not, by that token, transform the firearm for which a licence could have been obtained into a prohibited weapon. In the same vein, under the 1967 Act, the possession of a prohibited weapon and a firearm not so classified, subjected the defendant to a similar penalty of imprisonment for life, before a Circuit Court (see section 20(4)(ii) and 20(4)(c)(ii)).

[75] On the contrary, the new dispensation wrought by the Firearms Act, 2022 prescribes disparate penalties. As we have already concluded, the penalty for being in possession of a firearm without the appropriate authorisation is mandatory imprisonment for life with a prescribed minimum period of 15 years to be served before eligibility for parole (see para. [40] above). On the other hand, a person convicted for being in possession of a prohibited weapon shall be sentenced to a period of incarceration of between 15 and 25 years under section 5(2) of the Firearms Act, 2022. For ease of reference, we set out section 5(2):

> "A person who contravenes subsection (1) commits a felony and shall on conviction before a Circuit Court be sentenced to imprisonment for such term, of not less than fifteen years nor more than twenty-five years, as the Court considers appropriate."

[76] While the type of sentence prescribed is mandatory imprisonment, the legislature has bestowed a discretion on the length of the sentence between the minimum and maximum prescribed penalties. This circumscription of the judge's discretion is evident from the phrases "such term" and "as the Court considers appropriate". And so we return to the other important consideration which required the learned judge to make enquiries concerning the harmony of the facts with the indictment. That is, a defendant charged with being in possession of a prohibited weapon is denied the benefit of the CJAA.

[77] Section 42C of the CJAA was amended by the Seventh Schedule of the Firearms Act, 2022 by the insertion of subsection (d). As amended, so far as is relevant, the section provides:

> "42C. The provisions of this Part [reduction of sentence upon guilty plea] shall not apply to a defendant who pleads guilty to –
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) an offence under Part II of the Firearms (Prohibition, Restriction and Regulation) Act [prohibitions in respect of firearms and ammunition]."

Therefore, a defendant who pleads guilty to being in possession of a prohibited weapon is not entitled to the statutory percentage reduction in his sentence allowed under section 42D(1) and (2) of the CJAA. Neither would the court be competent to reduce his sentence below the prescribed minimum period of 15 years' imprisonment, which is otherwise available under section 42D(3)(a) of the CJAA.

[78] On the contrary, and by the fact that it has not been specifically excluded, the offence of being in the possession of a firearm without the appropriate authorisation under section 45(1)(a) of the Firearms Act, 2022, is not subjected to the same or similar exclusion in relation to the CJAA. This was accepted by the learned DPP during oral arguments. Therefore, the provisions of the CJAA would apply in calculation of any pre-parole period. In consequence of that, the learning in cases such **Meisha Clement v R** and **Daniel Roulston v R** would also be applicable. It should be said that in the exercise of the narrow discretion given under section 5(2) of the Firearms Act, 2022, it would be a counsel of prudence for sentencing judges to abide by the learning in **Meisha Clement v R** line of cases.

Disposal

[79] The respondent was indicted for unauthorised possession of firearm and ammunition, contrary to section 45(2)(a) of the Firearms Act, 2022. Those were the charges to which the respondent pleaded guilty. As we have noted above, the subsection does not exist. It is against this background that the learned DPP's application to amend the indictment's statement of offence to read, "contrary to section 45 (1)(a)" is considered. There was no opposition to the learned DPP's request. The amendment being sought is one of form and not substance. That is, it seeks to correct the section of the law under which the charges were framed without altering the particulars of the offence in any way. Although we are disposed to granting the amendment, it is moot in light of how we propose to dispose of the appeal.

[80] The learned DPP urged us to remit the case to the High Court Division of the Gun Court. In the interests of justice, we are constrained to adopt that course, although not by either the **Osmond Williams v R** or inadequate legal advice route. The road we think appropriate is that taken by this court in **Richards and Williams**. The learned judge's failure to make the necessary enquiries against the background of the discrete offences created by the Firearms Act, 2022 has resulted in the respondent being sentenced, not only for an offence under a non-existent section but, more importantly, an offence for which there was no factual support. In these circumstances, although there is no appeal against the convictions before this court, the question of the appropriateness of the sentences is indivisible from the question of whether the convictions are proper.

Conclusion

[81] By the passage of the Firearms Act, 2022, the legislature clearly intended to usher in a new penalty regime for the illegal possession of firearms and ammunition, amongst other things. A hallmark of this dispensation is the introduction of prescribed mandatory minimum penalties for the possession of unauthorised and prohibited firearms. That statutory scheme necessarily signalled a curtailment, at the low end, and the abolition at

the high end, of the previously enjoyed judicial discretion to decide the type of sentences and, where a custodial sentence was considered appropriate, its duration.

[82] Against this background, the learned judge fell into error when she held that the discretion she enjoyed prior to the promulgation of the Firearms Act, 2022, subsisted. The learned judge did not have the power to impose the sentences she did. Further, in light of the new statutory minima, the sentences imposed were manifestly inadequate or unduly lenient. Consequently, the sentences must be quashed.

[83] Beyond that, the introduction of discrete and mutually exclusive offences under sections 5 and 45 has precipitated a difficulty in substituting appropriate sentences for those quashed. While both sections carry a similar prescribed minimum period of incarceration, as observed above, the former is determinate, whereas the latter is indeterminate. In short, as we tried to demonstrate, it may be that the respondent should have been indicted and arraigned under section 5 and not section 45 of the Firearms Act, 2022. Consequently, and this is paramount, it would be both irregular and unjust to substitute sentences prescribed for offences under section 45 if the respondent should have been indicted under section 5. The court's recourse is to quash the conviction, under its inherent power of controlling its processes, in the interests of justice, having regard to the factual uncertainty underlining the indictment before us.

[84] Consequently, we set aside the sentences and remit the case to the court below for the respondent to be re-arraigned in accordance with the facts, ascertained and disclosed by the prosecution. In passing, we note that section 5 does not contemplate a charge for illegal possession of ammunition. We flag this for the consideration of the prosecution, going forward, but make no pronouncement upon it.

[85] We make mention of one other matter before finally leaving this matter. That concerns the submissions on *autrefois acquit* and *autrefois convict*. Submissions were made under this head only on behalf of the respondent. This appeal did not directly raise those questions. They were raised obliquely, as possible defences available to the

respondent, in the event the case is remitted. Accordingly, we refrain from making any pronouncements on those questions without the benefit of grounds of appeal and full arguments from both sides.

Orders

[86] In light of the foregoing, we make the following orders:

[1] The appeal is allowed.

[2] The convictions are quashed.

[3] The sentences of four years and three months' imprisonment imposed on count one for unauthorised possession of firearm and four years and three months' imposed on count two for unauthorised possession of ammunition are quashed.

[4] The case is remitted to the High Court Division of the Gun Court for the appropriate charges to be determined and laid against the respondent.